

November 2, 2012

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: Universal Service Contribution Methodology; Universal Service Administrative Company Request for Guidance, WC Docket No. 06-122

Dear Ms. Dortch:

On behalf of inContact, Inc. ("inContact"), this ex parte letter responds to and supplements Verizon's ex parte submission in WC Docket No. 06-122 on October 25, 2012. Verizon's ex parte letter attached a white paper addressing Form 499-A revision deadlines and the Universal Service Administrative Company's ("USAC") ability to engage in the back-billing of Universal Service Fund ("USF") contributions for periods extending beyond the federal default statute of limitations ("default SOL") and/or applicable document retention period. Verizon's letter supplements pending petitions for review of the Wireline Competition Bureau's ("WCB" or "Bureau") order that established a one-year deadline for contributors to file revised Forms 499-A reducing their USF contributions but setting no limit for filings resulting in upward adjustments to contributions. Verizon argues that the Bureau's Order (1) violated the Administrative Procedure Act ("APA") because it was not the subject of a notice and comment rulemaking; (2) was beyond the Bureau's delegated authority; and (3) imposed an arbitrary and capricious deadline that otherwise conflicts with law, and is therefore invalid.

Itself the victim of a 2009 USAC back-billing of nearly \$300,000 in USF contributions based upon 2003 revenues, the timing of which exceeded not only the four-year default SOL and the then-applicable 3-year USAC document retention policy, but which also exceeded the current 5-year USAC document retention policy, inContact agrees with Verizon and supports its position vis-à-vis limits on back-billing. inContact emphasizes that even though USAC chose to ignore the law with respect to its back-billing of inContact, nevertheless the lawful limits on USAC's ability to back-bill already exist, whether in the form of the federal default SOL or applicable document retention periods. Therefore, inContact implores the Commission to acknowledge these limitations both prospectively *and retroactively*, and confirm that any back-billing exceeding these lawful limits is null and void.

MARASHLIAN & DONAHUE, LLC

TELEPHONE: (703) 714-1300
FACSIMILE: (703) 714-1330
EMAIL: MAIL@COMMLAWGROUP.COM
WEB: WWW.COMMLAWGROUP.COM

THE COMMLAW GROUP
1420 SPRING HILL ROAD
SUITE 401
MCLEAN, VIRGINIA 22102

In addition, inContact agrees with Verizon, and a number of other commenters, who have highlighted the inherent inequity in the Bureau's asymmetrical deadlines for Form 499-A revisions. In particular, inContact agrees that the Bureau exceeded the scope of its delegated authority when it adopted the policy, because the asymmetrical deadlines substantively impact the rights of filers and therefore serve as rules, which the WCB has no authority to adopt. Moreover, as a substantive rule, the policy was required to be subject to notice and comment per the APA. The rule is therefore invalid.

Furthermore, inContact supports Verizon's position that the order adopting the asymmetrical deadlines is arbitrary, capricious, otherwise contrary to law and raises significant constitutional concerns. The order defies the equitable contribution mandate of Section 254 of the Communications Act ("the Act"). The one-year limitation on downward adjustments inevitably allows the FCC to retain erroneously collected USF fees. Moreover, the rule prevents revisions even in cases where downward adjustments are justifiable and based upon circumstances outside of a filer's control. Even more concerning, the limitation quashes constitutionally protected due process rights by denying filers the opportunity to recover wrongfully collected fees. The one-year limit finds no justification in the Commission's rules or orders.

More importantly, the corresponding omission of a deadline for revisions resulting in increased USF fees likewise conflicts with basic notions of due process as well as with Commission policies on data retention. The FCC's rules require providers to retain documents related to Form 499 filings for five years. A policy enabling upward adjustments to a filer's USF contribution obligation at any time is entirely inconsistent with a filer's responsibility to maintain records for a mere five years. After the expiration of the document retention period, a filer can no longer be expected to maintain records supporting or refuting a claim by USAC that a revised filing resulting in additional USF fees is warranted. Verizon cites to the FCC's five-year record retention policy and rules requiring USF audits to be completed within five years as evidence that the FCC has already imposed limits on back-billing. Verizon also aptly points out that inevitably, some providers will be unable to prove (based upon company records) that USF fees demanded by USAC are not owed, contrary to their due process rights, and will ultimately contribute more than their fair share to the Fund in violation of Section 254.

In its *ex parte*, Verizon also raises the four-year federal default SOL as a limitation on USAC's ability to demand additional USF fees. inContact first raised the default SOL in a filing before the Commission in 2009. On January 23, 2009, nearly five years after its 2004 Form 499-A filing, USAC invoiced inContact for \$298,410 in true-up adjustments (in addition to true-up adjustments paid in 2004) based on its 2003 revenues ("2009 Invoice"). On April 13, 2009, inContact filed a Petition for Special Relief and Waiver ("Petition") with the FCC seeking a declaration that the 2009 Invoice was untimely and ineffective, as a matter of law. In the Petition, inContact argued that because USAC's imposition of the true-up charges stemmed from authority delegated pursuant to Section 254 of the Act, the assessment was barred by federal default SOL.

On May 6, 2009, the FCC placed inContact's Petition on Public Notice seeking comments and reply comments from interested parties. No comments were filed. inContact filed Reply Comments on June 22, 2009. inContact emphasized that the assessment is time-barred by the federal default SOL, was unfair and discriminatory in violation of Section 254 of the Act, violated inContact's due

process rights and was arbitrary, capricious and otherwise conflicted with the law. Without a single commenter raising a question about timeliness, over a year after inContact's Petition was filed, the Bureau denied its Petition on procedural grounds on May 7, 2010. As the basis for its denial, the WCB cited the FCC rule requiring a party seeking review of a USAC "decision" to file "within sixty (60) days of the issuance of the decision."

On June 7, 2010, inContact filed an Application for Review of the Bureau's Order ("Application") with the FCC. After waiting yet another year without action by the FCC, inContact filed a Petition for Writ of Mandamus ("Mandamus Petition") with Court of Appeals for the D.C. Circuit seeking an order requiring the FCC to act. The Court denied the Mandamus Petition on December 22, 2011. Thereafter, the FCC upheld the Bureau's procedural decision, and denied in part and dismissed in part Petitioner's Application on January 5, 2012. inContact filed a Petition for Review with the D.C. Circuit, seeking to overturn the FCC's January 5th Order, on March 5, 2012. The case is fully briefed and scheduled for oral argument on December 14, 2012.

Although the D.C. Circuit has yet to rule on whether the FCC rightfully upheld the Bureau's procedural dismissal of the Petition, the fact remains that the federal default SOL applies to USF collection actions, barring any collection action initiated over four years after fees became due. This four-year limitation period applies to all claims arising under an Act of Congress promulgated after December 1, 1990 for which no other limitation period is specified.¹ The Telecommunications Act, enacted by Congress in 1996, includes no time limitation for actions brought by or against the Commission.² As a result, the federal default SOL clearly applies to the Act, and courts have found the same.³ Verizon agrees with inContact on this point in its ex parte. Verizon further notes that no

¹ 28 U.S.C. § 1658(a); *Verizon New England, Inc. v. New Hampshire Public Utils. Comm'n*, 2005 WL 1984452, *5 n.5 (D.N.H. 2005), citing *Pepepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.*, 215 F.3d 195, 203 n.5 (1st Cir. 2000) ("Absent the existence of an explicit limitations period, civil claims that arise under federal statutes enacted after December 1, 1990 are subject to 28 U.S.C. § 1658(a) which imposes a four-year limitations period on such actions."); *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 n.1 (1995) (describing section 1658 as a "general, 4-year limitations period for any federal statute [enacted after Dec. 1, 1990] without one of its own"); *Campbell v. Amtrak*, 163 F. Supp. 2d 19, 22 (D.D.C. 2001) (describing section 1658 as the "federal default statute of limitations"). Note that the statute applies to actions brought by a federal agency. See, e.g., *Reich v. Sea Sprite Boat Co.*, 50 F.3d 413, 417 (7th Cir. 1995) (finding an action brought by secretary of labor against private company within the four year statute of limitations under 28 U.S.C. § 1658); *SEC v. Buntrock, Fed. Sec. L. Rep.* (CCH) P92, 833 (N.D. Ill. 2004) (applying the four year statute of limitations under 28 U.S.C. § 1658 to an action by the SEC under the Private Securities Litigation Reform Act).

² See, e.g., 47 U.S.C. §§ 151 et seq.; 47 C.F.R. §§ 0.1 et seq.

³ See, e.g., *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 124 n.5 (2005) ("Since the claim here rests upon violation of the post-1990 TCA [the 1996 Act], § 1658 would seem to apply."); *Esquire Comms. Co., Inc. v. Baca*, 269 F. Supp. 2d 1310, 1320 (D.N.M. 2003) ("Because the Telecommunications Act was enacted after December 1, 1990, the four-year statute of limitations applies to the claims under the federal Telecommunications Act."); *Verizon Maryland Inc. v. RCN Telecom Servs., Inc.*, 232 F. Supp. 2d 539, 552-54 (D. Md. 2002); *Bell Atlantic-Pennsylvania, Inc. v.*

federal law (including the Debt Collection Improvement Act or DCIA) prevents the FCC from adopting reasonable limits on USAC's ability to look back to determine if contributions are owed. Likewise, USAC, consistent with FCC rules, cannot perform an audit and demand documents beyond the document retention period (presently five years). And, imposition of USF fees beyond this period would deprive contributors of their due process rights. Furthermore, principles of equity and the Universal Service mandates of the Act limit USAC's ability to collect USF fees beyond the federal default SOL, or at most, the document retention period.

For these reasons, inContact supports Verizon's request that the Commission grant the pending applications for review of the Bureau's Order and establish a symmetrical period for filing revisions to Forms 499-A to adjust revenues up or down. inContact further asks the Commission to honor the federal default SOL and terminate USAC's attempts to invoice contributors for USF fees beyond the limitations period.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'JSM', with a long horizontal flourish extending to the right.

Jonathan S. Marashlian
Jacqueline R. Hankins
Marashlian & Donahue, LLC
1420 Spring Hill Road, Suite 401
McLean, Virginia 22102
Tel: (703) 714-1313
E-mail: jsm@commlawgroup.com

Counsel for inContact, Inc.

Pennsylvania Pub. Utils. Comm'n, 107 F. Supp. 2d 653, 668 (E.D. Pa. 2000); *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 1998 WL 156674, *3-*5 (N.D. Ill. 1998).